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1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: METHYL TERTIARY BUTYL  
ETHER ("MTBE") PRODUCTS  
4 LIABILITY LITIGATION

MDL 1358

00 Civ. 1898 (SAS)

5 -----x

6 New York, N.Y.  
May 13, 2014  
7 5:10 p.m.

8 Before:

9 HON. SHIRA A. SCHEINDLIN,

10 District Judge

11

12 APPEARANCES

13

14 WEITZ & LUXENBERG, P.C.  
Attorneys for Plaintiff La Susa  
BY: ROBIN L. GREENWALD

15

16 MILLER AXLINE & SAWYER LLP  
Attorneys for NJ DEP  
17 BY: MICHAEL D. AXLINE

18

19 COHN, LIFLAND, PEARLMAN, HERRMANN & KNOFF LLP  
Attorneys for NJ American Water Company  
BY: LEONARD Z. KAUFMANN

20

21 JACKSON GILMOUR & DOBBS P.C.  
Attorneys for Commonwealth of Puerto Rico  
22 BY: JOHN D.S. GILMOUR

23

24 LEE VARTAN  
Executive Assistant Attorney General  
State of New Jersey

25

SOUTHERN DISTRICT REPORTERS, P.C.  
(212) 805-0300



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1 APPEARANCES

2

GWEN FARLEY  
Deputy Attorney General  
State of New Jersey

4

5 McDERMOTT, WILL & EMERY  
Attorneys for Defendant ExxonMobil Corp.  
6 BY: JAMES A. PARDO  
STEPHEN J. RICARDELLI

7

8 SHEPPARD MULLIN RICHTER & HAMPTON LLP  
Attorneys for Defendant ExxonMobil  
9 BY: JEFFREY J. PARKER

10

KING & SPALDING LLP  
Attorneys for Defendant ExxonMobil  
11 BY: CHARLES C. CORRELL, JR.

12

13 ARCHER & GREINER, P.C. WILLIAM STACK  
Attorneys for Defendant ExxonMobil  
14 BY: WILLIAM J. STACK  
DAVID EDELSTEIN

15

16 WALLACE, KING, DOMIKE & BRANSON, PLLC  
Attorneys for Defendants Shell Oil Co.;  
17 Texaco Refining and Marketing, Inc.;  
Chevron U.S.A. Inc.; Motiva Enterprises;  
18 Equilon Enterprises, LLC  
BY: RICHARD E. WALLACE, JR.

19

20 BEVERIDGE & DIAMOND  
Attorneys for Sunoco, Inc.  
21 BY: DANIEL M. KRAININ

22

EIMER STAHL LLP  
Attorney for CITGO Petroleum Corp.  
23 BY: PAMELA R. HANE BUTT

24

25

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1 APPEARANCES

2

LATHAM & WATKINS LLP

3 Attorneys for Defendant Conoco Phillips

4 BY: JON D. ANDERSON

5 MANATT, PHELPS & PHILLIPS LLP

Attorneys for Defendant USA Gasoline Corp.

6 BY: SAMANTHA J. KATZE

7 KIRKLAND & ELLIS LLP

Attorneys for Defendant British Petroleum

8 BY: ANDREW RUNNING

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1 set by your Honor for motions for summary judgment -- which  
2 isn't set yet, there is no date on the calendar -- may drive  
3 our ability to work with them. I am interested in talking with  
4 Mr. Axline if he thinks we may get to a solution with your  
5 involvement. We are not before you on motions for summary  
6 judgment until the 10th of June, so there is time to talk with  
7 them.

8 THE COURT: Good. I'll see you then on that.

9 Then there was an issue about Tauber Oil's expert  
10 report. Tauber Oil is no longer in the case, so I assume that  
11 is moot.

12 Then I was told the parties would update me on  
13 settlement in the New Jersey case. You just sort of did.  
14 There was no update other than what you gave or there is?

15 MR. KAUFMANN: No, there is not, your Honor.

16 THE COURT: The last item has to do with the  
17 protective order. Sorry, there are two more items. One of the  
18 last items has to do with lifting the protective order for the  
19 Hamner Institute and the Experimental Pathology Laboratories,  
20 Inc. records. I guess the question is why? What is the need  
21 for the protective order to be listed?

22 The plaintiffs agreed that the materials would be  
23 pursuant to a protective order. The Hamner order in particular  
24 had a nontermination provision that said, "The provisions of  
25 this order shall not terminate at the conclusion of this

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1 particular action," which was Crescenta Valley, "and shall  
2 remain in place until 30 days after the conclusion of all  
3 aspects of the last MDL 1358 lawsuit," which I don't really  
4 expect to live to see. But be that as it may, that's a long  
5 way off.

6 Why should I lift this? You agreed it would last  
7 until the last MDL lawsuit is concluded.

8 MR. AXLINE: Your Honor, the results of the discovery  
9 that followed from those protective orders included information  
10 that we believe regulatory agencies will be interested in and  
11 that are important to public health. We would like the  
12 opportunity to brief to you the notion that that protective  
13 order should now be lifted.

14 The real gravamen of the order was the Hamner report  
15 had not come out.

16 THE COURT: I remember that, yes.

17 MR. AXLINE: They came in and said it's not final yet.  
18 That was the main thing that you observed. We got together and  
19 worked out some additional terms, and those went into what was  
20 submitted.

21 THE COURT: I remember that. You did agree that it  
22 would remain in place until the end of the MDL. Can you  
23 backtrack on your agreement, much as Mr. Quinn tried to  
24 backtrack?

25 MR. AXLINE: I think there are compelling reasons to

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1 do so involving public health at the time we entered into that  
2 agreement. As I said, the real driving force behind this is we  
3 believe there is some information that regulatory agencies  
4 should have that relate to public health. That is the impetus  
5 for it.

6 THE COURT: Is this something that the Hamner  
7 Institute should be litigating or the defendants?

8 MR. AXLINE: We began by meeting and conferring with  
9 EPL, the laboratory that analyzed the results and the Hamner  
10 Institute. EPL has now been released from its confidentiality  
11 agreement. The Hamner Institute, my understanding is, although  
12 we don't have this in writing yet, has no objection to lifting  
13 it.

14 THE COURT: Which is the interested party now, the  
15 Hamner Institute or the defense lawyers here representing the  
16 defendants? Why is it their issue as opposed to the Hamner  
17 Institute? If there is a public health argument, I don't know  
18 why the defendants would be fighting this battle. The Hamner  
19 Institute should appear and fight.

20 MR. AXLINE: That is a very interesting question, your  
21 Honor.

22 THE COURT: It is. Mr. Pardo, what is it to you, so  
23 to speak?

24 MR. PARDO: First, let me say I think you're right, it  
25 is an issue for the Hamner. They are not here. EPL is not

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1 here. I'm not even aware if they were told about this  
2 conference.

3 THE COURT: Not only were they told, they apparently  
4 have said they have been released from their confidentiality  
5 agreement with the Hamner so they don't really have a dog in  
6 the fight and they take no position on releasing it. It's all  
7 Hamner. Go ahead.

8 MR. PARDO: I will take Mr. Axline at his word on  
9 that. I don't know that.

10 THE COURT: Me neither. I'm taking his word just like  
11 you are. Go ahead.

12 MR. PARDO: I think from the defense standpoint, and  
13 I'm a little bit hamstrung here because I'm not sure what he is  
14 talking about when he talks about the public health concerns --

15 THE COURT: Use your imagination.

16 MR. PARDO: I really don't know. I have an  
17 imagination.

18 THE COURT: There must be something in the report that  
19 says a concentration of this amount of stuff in water isn't  
20 good for humans. That's what my imagination tells me. Go  
21 ahead.

22 MR. PARDO: The report and most of the underlying data  
23 has been turned over to the United States Environmental  
24 Protection Agency already.

25 THE COURT: To the United States what?

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1           MR. PARDO: To the USEPA. They have it. That was the  
2 whole point of issuing the report.

3           THE COURT: I kind of wondered about that. If it is  
4 already with the EPA, that's the regulatory agency, who doesn't  
5 have it?

6           MR. AXLINE: They do not have all the material that  
7 was produced in discovery, your Honor. They have some of it.

8           THE COURT: EPA doesn't have it according Axline, does  
9 have it according to Pardo. There is a way to get at that  
10 fact. That's a fact.

11          MR. PARDO: I'm not sure we are saying something  
12 completely different.

13          THE COURT: The report they may have. They don't have  
14 the underlying raw data. They don't have everything.

15          MR. PARDO: OK, the data and everything. We  
16 produced -- when I say "we," Hamner -- produced well over  
17 a million pages of data, documents, reports. Pretty much  
18 everything was made available to Mr. Axline's office and the  
19 plaintiffs.

20          THE COURT: That may be. How about to the EPA?

21          MR. PARDO: I don't know that all of that would have  
22 been shared with the EPA.

23          THE COURT: That's right. That's what he is saying is  
24 the public health issue, everything that plaintiffs have should  
25 be released to the regulatory agencies.



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1 MR. PARDO: I think before we go lifting a protective  
2 order that your Honor put in place --

3 THE COURT: I wasn't about to lift. Why this your  
4 issue, not the institute's?

5 MR. PARDO: We have a right to know what he is talking  
6 about.

7 THE COURT: The million pages? Everything you gave,  
8 the pages?

9 MR. PARDO: That is not specific enough, your Honor.

10 THE COURT: It's not? You gave it. Not you. The  
11 Hamner Institute released all million pages. Mr. Axline argues  
12 all million pages go to the EPA. That's specific. Everything  
13 the plaintiffs got they say should be in the hands of the  
14 regulatory agencies at this point. The work is no longer in  
15 progress. It's not a report that hasn't been released.

16 MR. PARDO: But it is information that was designated  
17 as confidential pursuant to this order.

18 THE COURT: I understand that. There are changed  
19 circumstances, one of which, as you said, is the report is in  
20 the hands of the EPA but not the underlying data.

21 MR. PARDO: I'm not aware the EPA has made a request  
22 for this data. They have the data. They have had the report  
23 for several years.

24 THE COURT: That is turning the argument around. That  
25 is saying why is the plaintiff representing the EPA. I'm

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1 saying why is the defendant representing the Hamner Institute.  
2 What we really need is the EPA and the Hamner Institute and let  
3 them duke it out, and both of you get out of this argument.

4 MR. PARDO: Exactly. I'm not sure what his interest  
5 here is.

6 THE COURT: I agree. But the flip side of the  
7 question, I'm not sure what yours is, either. What are you  
8 protecting? It's not your issue, either. It's Hamner versus  
9 the EPA apparently. Let the EPA put in an affidavit.

10 MR. AXLINE: I can tell you what our interest is, your  
11 Honor. An affidavit from EPA might not be a bad idea. But  
12 they are shooting in the dark. They don't know what they don't  
13 know. We know what they don't know.

14 THE COURT: That's true, because you have all million  
15 pages.

16 MR. AXLINE: We don't think they are going to be  
17 interested in a million pages, your Honor. I appreciate the  
18 breadth of what you are saying. It would be much more targeted  
19 than that.

20 THE COURT: Then Mr. Pardo says identify it, if it is  
21 much more targeted, identify what you think they need and let  
22 them do an affidavit. Even though I understand they don't know  
23 what they don't know, they would say we have a public health  
24 interest, we want to know the data that supports the report, it  
25 has been shared with us that there is data that would be of

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1 interest, so we want it. Whatever they can say in general  
2 terms at least inserts them into the argument.

3 By the same token, defendants should tell me why it is  
4 their issue to brief in response at all as opposed to Hamner.  
5 At one time we had lawyers for Hamner on the phone or in  
6 person. I remember that.

7 MR. PARDO: There still are.

8 THE COURT: They aren't here, though. There is nobody  
9 here representing Hamner today. Mr. Wallace.

10 MR. WALLACE: My client Shell was one of the sponsors  
11 of the agreement. We don't have any interest in this. We  
12 would prefer to see you decide the plaintiffs' motion.

13 THE COURT: Who is opposing it? If you have no  
14 interest, who is writing the other brief?

15 MR. WALLACE: With Hamner responding.

16 THE COURT: I agree.

17 MR. WALLACE: As I recall it, they raised some concern  
18 about --

19 THE COURT: I am happy to have Hamner respond. Does  
20 any defendant present wish to respond also? Shell apparently  
21 doesn't. Does any defendant wish to respond?

22 MR. PARDO: To the motion they are going to bring?

23 THE COURT: To the motion to lift this protective  
24 order to allow the Hamner data to be made available to the  
25 regulatory agencies.

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1 MR. PARDO: My client was also one of the --

2 THE COURT: I know. That wasn't my question. Do you  
3 wish to oppose the motion?

4 MR. PARDO: I don't know until I see it.

5 THE COURT: Mr. Wallace does. It's been described to  
6 you. It is to lift the protective order and allow the data to  
7 be turned over to the regulatory agencies. You should know  
8 whether you wish to oppose that or not. Mr. Wallace says he  
9 doesn't wish to oppose it. Hamner will, I assume.

10 MR. PARDO: I believe we will oppose that, your Honor.

11 THE COURT: There you go.

12 MR. WALLACE: My only concern, your Honor, is that the  
13 plaintiffs go to EPA and get them involved in a court  
14 proceeding over some secretive material regarding a study that  
15 my client sponsored that is being withheld contrary to public  
16 interest. I'm not sure you need EPA weighing in on what they  
17 don't know.

18 THE COURT: Mr. Pardo suggests that I do, and I  
19 thought so, too. He is saying I don't really see what the  
20 plaintiffs' interest is, why isn't the EPA asking for this. I  
21 said that's interesting, we really should have the EPA  
22 litigating with Hamner. Then Mr. Axline correctly said, I'm  
23 the only one who knows what is in the material, EPA doesn't  
24 know what it doesn't have.

25 I think it could make general statements of its

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1 regulatory purpose and why it has a need for fuller  
2 understanding, etc., without knowing what the data is. Go  
3 ahead and make this motion. I can't stop this one and it is of  
4 interest.

5 Notice it to the Hamner Institute as well as  
6 defendants. If they do not choose to oppose it, then I will  
7 note that in the decision, that they have offered no  
8 opposition. That will weigh heavily in my thinking, I assure  
9 you, if they choose not to oppose it.

10 You can make the motion, Mr. Axline. Be sure that  
11 they get notice of it as well as all the liaison, Mr. Pardo,  
12 and that it gets circuited, and we will see who opposes.

13 MR. WALLACE: I only hope that Mr. Axline does not go  
14 to the agency and say I got it directly from a federal judge in  
15 New York, Judge Scheindlin.

16 THE COURT: Why don't you worry about your part of  
17 this, not Mr. Axline's part, not the EPA's part, not the Hamner  
18 Institute. Worry about Shell. That's enough to worry about.  
19 You stay with that. You told me you weren't opposing it. I  
20 don't think you have more to add.

21 The last item on the agenda is the OCWD station  
22 matrix. The defendants report that the parties are drafting a  
23 CMO reflecting a workable station matrix and this new matrix is  
24 going to narrow the number of defendants at each station. I  
25 was told the parties will update me on this at the conference.

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